



FREEDOM OF INFORMATION



Connecticut Freedom of Information Commission • 18-20 Trinity Street, Suite 100 • Hartford, CT 06106
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Emergency Medicine Physicians of Fairfield
County, LLC and Emergency Medicine
Physicians of New London County, LLC
Complainant(s)
against

Notice of Meeting

Docket #FIC 2016-0677

Commissioner, State of Connecticut, Department of
Social Services; and State of Connecticut, Department of
Social Services
Respondent(s)

July 6, 2017

Transmittal of Proposed Final Decision

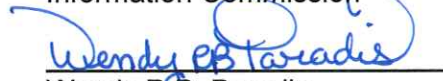
In accordance with Section 4-179 of the Connecticut General Statutes, the Freedom of Information Commission hereby transmits to you the proposed finding and decision prepared by the hearing officer in the above-captioned matter.

This will notify you that the Commission will consider this matter for disposition at its meeting which will be held in the Freedom of Information Commission Hearing Room, 18-20 Trinity Street, 1st floor, Hartford, Connecticut, at **2 p.m. on Wednesday, July 26, 2017**. At that time and place you will be allowed to offer oral argument concerning this proposed finding and order. Oral argument shall be limited to ten (10) minutes. For good cause shown, however, the Commission may increase the period of time for argument. A request for additional time must be made in writing and should be filed with the Commission **ON OR BEFORE July 17, 2017**. Such request **MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, and (2) include a notation indicating such notice to all parties or their representatives.**

Although a brief or memorandum of law is not required, if you decide to submit such a document, an **original and fourteen (14) copies** must be filed **ON OR BEFORE July 17, 2017**. **PLEASE NOTE: Any correspondence, brief or memorandum directed to the Commissioners by any party or representative of any party MUST BE (1) copied to all parties, or if the parties are represented, to such representatives, (2) include a notation indicating such notice to all parties or their representatives and (3) be limited to argument. NO NEW EVIDENCE MAY BE SUBMITTED.**

If you have already filed a brief or memorandum with the hearing officer and wish to have that document distributed to each member of the Commission, it is requested that **fifteen (15) copies** be filed **ON OR BEFORE July 17, 2017** and that **notice be given to all parties or if the parties are represented, to their representatives, that such previously filed document is being submitted to the Commissioners for review.**

By Order of the Freedom of
Information Commission


Wendy R.B. Paradis
Acting Clerk of the Commission

Notice to: Attorney Stephen M. Cowherd and Attorney Amy E. Zillis
Assistant Attorney General Emily Melendez

FREEDOM OF INFORMATION COMMISSION
OF THE STATE OF CONNECTICUT

In the Matter of a Complaint by

Report of Hearing Officer

Emergency Medicine Physicians
of Fairfield County, LLC; and
Emergency Medicine Physicians
of New London County, LLC

Complainants

against

Docket #FIC 2016-0677

Commissioner, State of Connecticut,
Department of Social Services; and
State of Connecticut, Department of
Social Services,

Respondents

July 6, 2017

The above-captioned matter was heard as a contested case on January 18, 2017, at which time the complainants and the respondents appeared, stipulated to certain facts and presented testimony, exhibits and argument on the complaint.

After consideration of the entire record, the following facts are found and conclusions of law are reached:

1. The respondents are public agencies within the meaning of §1-200(1), G.S.
2. It is found that, by email dated April 19, 2016, the complainants requested that the respondents provide them with copies of public records, as follows:
 1. All documents relating to the recent provider audits of Emergency Medicine Physicians of Fairfield County, LLC and Emergency Medicine Physicians of New London County, LLC conducted by the DSS Office of Quality Assurance – Audit Division, resulting in Report No. PA-MD-16-75 and Report No. PA-MD-16-76, respectively, (collectively, the “Audit Reports”) including but not limited to:
 - a. Sampling/extrapolation documents:
 - i. Sample Plan and Design;

- ii. Sample Size Determination;
 - iii. Definition of Sampling Unit;
 - iv. Randomizer (software and version used);
 - v. Random Numbers (files generated);
 - vi. Seed Number(s) for randomization;
 - vii. Audit Universe Definition;
 - viii. Universe File (file);
 - ix. Sampling Frame Definition, if different from Universe;
 - x. Sample Frame (file);
 - xi. Specification of the algorithm by which the stream of random numbers generated in v. and vi., above, results in the list of items to be sampled from the Sampling Frame;
 - xii. Medical Review Sheet(s) with claim by claim assessment of all 200 claims;
 - xiii. Confidence and Precision Estimate;
 - xiv. Standard Deviation of the Estimate;
 - xv. Printout of Estimation, if statistical package was used;
 - xvi. CT DSS Audit Division's Audit Standards for Sample Size, Precision and Confidence in Extrapolations;
 - xvii. Stratification protocol;
 - xviii. Descriptions, formulas, summaries and information relating to the random sampling method and computer program(s) used; and
 - xix. Descriptions, formulas, summaries and information relating to the extrapolation of the audit results;
 - b. All documents that identify and/or quantify underpayments found in either audit;
 - c. All audit work papers relating to Audit Reports; and
 - d. All DSS audit guidelines or audit manuals applicable to the audits.
2. All documents relating to previously proposed agency regulations Conn. Agencies Regs. §§ 17b-99(d)-1 to 17b-99(d)-6, (formerly cited as §§ 17b-99-1 to 17b-99-6) (the "Proposed Regulations"), and current and prior proposed amendments and/or previous versions thereto, including but not limited to:

- a. All documents relating to DSS interpretation of, or guidance (including audit guidelines, checklists, or other similar documents), relating to, the Proposed Regulations that discuss the use of sampling and extrapolation in determining overpayment or underpayment amounts in audits;
- b. All public comments and hearing notes regarding the Proposed Regulations, relating to the use of sampling and extrapolation in DSS audits;
- c. All reports provided to DSS examining its audit methodology, including but not limited to its use of sampling and extrapolation; and
- d. All correspondence, meeting minutes, or other documents relating to DSS' review of the Proposed Regulations and its audit methodology, whether internal to DSS or with other government entities or third parties.

3. It is found that, by email dated April 22, 2016, the respondents acknowledged the complainants' request, indicating that they were in the process of searching for responsive records.

4. It is found that, by email dated May 3, 2016, the complainants corresponded with the respondents, requesting a status update on the request.

5. It is found that, by email dated May 4, 2016, the respondents indicated that they were doing their best to comply with the statutory standard of promptness in the Freedom of Information ("FOI") Act.

6. It is found that, by email dated June 16, 2016, the complainants again requested a status update on their request, this time explaining that being able to obtain the requested records promptly was critical to their defense in a Medicaid audit where, according to the Department of Social Services ("DSS"), the alleged exposure was over \$5 million.

7. It is found that, by email also dated June 16, 2016, the respondents replied to the complainants, indicating that they were checking into when the responsive records might be ready for disclosure.

8. It is found that, by email dated June 17, 2016, the respondents informed the complainants that all of the records responsive to the request in paragraph 1.a, above, with the exception of paragraph 1.a.xii, had been forwarded to the complainants' counsel by email on January 19, 2016 (which date preceded the date of the request for records in the instant matter). It is found that the respondents asked the complainants to check with their counsel with regard to this disclosure. It is further found that the respondents indicated that, with

regard to the request in paragraph 1.a.xii, above, they were not sure what the complainants were requesting.

9. It is found that, by email dated June 20, 2016, the respondents sent records responsive to the request in paragraph 2, above, to the complainants.

10. It is found that, by email dated June 24, 2016, the complainants thanked the respondents for disclosing records responsive to paragraph 2, above. It is further found that complainants clarified the request in paragraph 1.a.xii, above. It is further found that the complainants requested confirmation that all records responsive to paragraph 1.a, above, with the exception of paragraph 1.a.xii, had been disclosed.

11. It is found that, by email dated June 24, 2016, the respondents sought confirmation that the complainants had received the records disclosed on January 19, 2016. See ¶ 8, above.

12. It is found that, by email dated July 5, 2016, the respondents informed the complainants that they did not have any records responsive to the request in paragraph 1.b, above.

13. It is found that, by email dated August 24, 2016, the complainants informed the respondents that they had not received any records responsive to the request in paragraphs 1.a.xii, 1.c, or 1.d, above.

14. It is found that, by email dated August 24, 2016, the respondents advised the complainants that, with the clarification provided, it was their position that the request in paragraph 1.a.xii, was subsumed by the request in paragraph 1.c, above, which was a request for audit work papers that the respondents would not be disclosing. It is further found that, by email dated August 25, 2016, the respondents informed the complainants that they did not have any records responsive to the request in paragraph 1.d, above.

15. By letter dated September 22, 2016 and filed September 23, 2016, the complainants appealed to this Commission, alleging that the respondents violated the Freedom of Information (“FOI”) Act by failing to provide them with copies of all non-exempt public records. Specifically, in the appeal, the complainants contended that “the Department should be required to produce the Medical Review Sheets and the audit work papers called for in items 1(a)(xii) and 1(c) of the request.”

16. Section 1-200(5), G.S., provides:

“Public records or files” means any recorded data or information relating to the conduct of the public’s business prepared, owned, used, received or retained by a public agency, or to which a public agency is entitled to receive a copy by law or contract under section 1-218, whether such data or information be handwritten, typed, tape-recorded, printed, photostated, photographed or recorded by any

other method.

17. Section 1-210(a), G.S., provides in relevant part that:

Except as otherwise provided by any federal law or state statute, all records maintained or kept on file by any public agency, whether or not such records are required by any law or by any rule or regulation, shall be public records and every person shall have the right to (1) inspect such records promptly during regular office or business hours, (2) copy such records in accordance with subsection (g) of section 1-212, or (3) receive a copy of such records in accordance with section 1-212.

18. Section 1-212(a), G.S., provides in relevant part that “[a]ny person applying in writing shall receive, promptly upon request, a plain, facsimile, electronic or certified copy of any public record.”

19. It is found that the requested records are public records within the meaning of §§1-200(5), 1-210(a), and 1-212(a), G.S.

20. At the start of the contested case hearing, the respondents contended that the appeal in this case was not filed with the Commission within thirty days of the respondents’ denial, within the meaning of §1-206(b)(1), G.S. Specifically the respondents argued that they acknowledged the request on April 22, 2016 and that any appeal to the Commission should have been filed within thirty days of the acknowledgement. In the alternative, the respondents contended that, on June 16, 2016, the complainants reiterated that they continued to wait for the respondents to disclose responsive records. The respondents contended that the failure to disclose records should have been construed as a denial of the request, which obligated the complainants to file their appeal within thirty days.

21. Section 1-206(b)(1), G.S., provides, in relevant part, as follows:

Any person denied the right to inspect or copy records under section 1-210 or wrongfully denied the right to attend any meeting of a public agency or denied any other right conferred by the Freedom of Information Act may appeal therefrom to the Freedom of Information Commission, by filing a notice of appeal with said commission. A notice of appeal shall be filed not later than thirty days after such denial. . . .

22. It is found that the respondents’ April 22, 2016 acknowledgement was not a “denial,” within the meaning of §1-206(b)(1), G.S. Rather, the acknowledgement was the respondents’ written confirmation that they were going to gather and provide the complainants with records responsive to the request. See ¶3, above. It is further found that, while the complainants did request a status update on June 16, 2016, the respondents’ same-

day reply to such request again indicated that the respondents were still engaged in the process of providing responsive records to the complainants. See ¶¶ 6-7, above. It is further found that the actual denial in this case did not issue until August 24, 2016. See ¶ 14, above. It is found that the complainants filed their appeal with the Commission on September 23, 2016--the thirtieth day after the issuance of the denial. Accordingly, because the appeal in this case was timely filed, the respondents' motion to dismiss was denied. See Town of West Hartford, et al. v. FOIC, et al., 218 Conn. 256, 260-63 (1991) (holding that the parties' renewed communication about the status of a public records request, even after a lapse of communication of more than thirty days, restarts the Commission's subject matter jurisdiction over such matter).

23. It is found that the complainants in this case, Emergency Medicine Physicians of Fairfield County, LLC and Emergency Medicine Physicians of New London County, LLC (collectively, "EMP" or "the complainants") are two group practices of emergency medicine physicians that have contracted with Stamford Hospital and Lawrence Memorial Hospital, respectively, to provide professional services to patients, including Medicaid patients, who come to the emergency rooms and/or urgent care centers operated by those hospitals.

24. It is further found that, prior to the issuance of the request for records in this case, the respondent agency's Audit Division audited the Medicaid billing records of the complainants for over and under billing of Medicaid patients, and completed two separate audit reports.¹ Based on the audit reports, the respondent agency seeks to recoup \$5,724,925² from EMT in alleged Medicaid overpayments made to the two groups from January 1, 2011 through December 31, 2013 (the "audit period").

25. It is found that the respondents' audit process is regulated by §17b-99(d), G.S.³ It is further found that such process relies on a sampling and extrapolation methodology whereby the Audit Division audits the medical records supporting a random sampling of 100 claims (that is, the charges for patient services) submitted to and paid by the respondent agency during the audit period and then, based on the average overpayment amount per sampled claim that the Audit Division calculates, that overpayment amount is extrapolated (that is, multiplied) to the entire universe of claims paid to the provider during the audit period. It is found that the resulting figure is the total dollar amount that the respondent agency seeks to recoup through the audit. It is found that the 100 claims sampled were chosen by a computer, from a total universe of 63,011 paid claims.

¹ The results of the two audits are reported in the respondent agency's Report Nos. PA-MD-16-75 and PA-MD-16-76. These final audit reports were issued on March 16, 2016.

² The recoupment is directed at EMT of New London in the amount of \$3,529,725 (which represents 78% of the total payments made by the Connecticut Medicaid program to that entity over the three year audit period) and at EMT of Fairfield County in the amount of \$2,195,200 (which represents 63% of the total payments made by the Connecticut Medicaid program to that entity over the three year audit period).

³ Section 17b-99(d)(1), provides, in relevant part, that "[t]he Commissioner of Social Services. . . for the purpose of conducting an audit of a service provider that participates as a provider of services in a program operated or administered by the department pursuant to this chapter. . . shall conduct any such audit in accordance with the provisions of this subsection. . . ."

26. In this case, it is found that respondents provided the complainants with all of the requested records except for the records described in paragraphs 1.a.xii and 1.c, above. The complainants contend that that they are entitled to these public records, which would allow them to determine whether the Audit Division used a statistically valid sampling and extrapolation methodology to arrive at the final overpayment determination.

27. The respondents contend that the records, which have not been disclosed to the complainants, are exempt from disclosure pursuant to 1) §1-210(a), G.S., (see ¶ 17, above); 2) §1-210(b)(1), G.S. (preliminary drafts and notes); 3) §1-210(e)(1), G.S., (a disclosure statute read in conjunction with §1-210(b)(1), G.S.); 4) §17b-90, G.S. (an exemption for information concerning persons applying for or receiving DSS assistance); 5) 42 U.S.C. §1396a(7) (requiring that state plans for medical assistance include safeguards concerning Medicaid information); and 6) 4) §1-210(b)(2), G.S., (invasion of personal privacy).

28. The complainants moved to have the Commission conduct an in camera inspection of the records claimed to be exempt from public disclosure. The hearing officer granted the complainants' motion.

29. On March 31, 2017, the respondents lodged in camera records with the Commission. The in camera records consist of six separate compilations of records totaling 662 pages. Each of the compilations was submitted in a separate manila folder. Upon inspection, the hearing officer realized that the in camera records contained in folder two (totaling seventeen pages) and the in camera records contained in folder six (totaling four hundred and eight pages) were highly redacted. The records contained in the four other folders were not redacted.

30. By Order dated May 17, 2017, the hearing officer informed the respondents that, in order evaluate the claims raised with regard to the records in folder two and folder six, the records would have to be resubmitted to the Commission for an in camera inspection without redactions.

31. On May 25, 2017, the respondents resubmitted the records contained in folders two and six without redactions. With regard to folder two, it is found that the information, which had been originally contained on seventeen pages, (see ¶ 29, above), had been condensed onto fourteen pages. Accordingly, these records will be referred to as follows: folder two ("F2"): IC-2016-0677-F2-1 through IC-2016-0677-F2-14. With regard to folder six, it is found that, while the respondents had originally submitted four hundred and eight pages, (see ¶ 29, above) folder six now contained four hundred and twelve pages. Accordingly, these records will be referred to as follows: folder six ("F6"): IC-2016-0677-F6-1 through IC-2016-0677-F6-412.

32. With regard to the claimed exemptions, the respondents first contend that the following records are exempt from disclosure pursuant to §1-210(b)(1), G.S.: folder one ("F1"): IC-2016-0677-F1-1 through IC-2016-0677-F1-27; folder three ("F3"): IC-2016-0677-F3-1; folder four ("F4"): IC-2016-0677-F4-1 through IC-2016-0677-F4-163; and folder five ("F5"): IC-2016-0677-F5-1 through IC-2016-0677-F5-47.

33. Section 1-210(b)(1), G.S., provides, in relevant part, that nothing in the FOI Act shall be construed to require disclosure of:

Preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure....

34. In 1980, the Connecticut Supreme Court interpreted the phrase “preliminary drafts and notes” in the FOI Act. See Wilson v. FOIC, 181 Conn. 324 (1980) (“Wilson”). The Wilson Court ruled that “preliminary drafts or notes reflect that aspect of an agency’s function that precedes formal and informal decision making. . . . It is records of this preliminary, deliberative and predecisional process that . . . the exemption was meant to encompass.” Wilson, 181 Conn. at 332. In addition, the Wilson Court interpreted the phrase “preliminary drafts and notes” in the FOI Act as identical to the deliberative process privilege found in 5 U.S.C. §552(b)(5) of the federal Freedom of Information Act, with the exception that, under Connecticut’s FOI Act, the public agency carried the additional burden to show that “the public interest in withholding such document clearly outweighs the public interest in disclosure.” See Wilson, 181 Conn. at 333-340.

35. The year following Wilson, the Connecticut legislature adopted Public Act 81-431, which added to the FOI Act the language now codified in §1-210(e)(1). See ¶ 24, below.

36. Accordingly, §1-210(b)(1), G.S., must be read in conjunction with §1-210(e)(1), G.S., which provides, in relevant part, in relevant part as follows:

Notwithstanding the provisions of [§1-210(b)(1), G.S.], disclosure shall be required of:

(1) Interagency or intra-agency memoranda or letters, advisory opinions, recommendations or any report comprising part of the process by which governmental decisions and policies are formulated, except disclosure shall not be required of a preliminary draft of a memorandum, prepared by a member of the staff of a public agency, which is subject to revision prior to submission to or discussion among the members of such agency.⁴

⁴ The Commission notes that, while the index to the in camera records only raises a §1-210(b)(1), G.S., exemption with regard to the records contained in folders four and five, because §1-210(b)(1), G.S., and §1-210(e)(1), G.S., must be construed together, the claim that the records in folders four and five are exempt pursuant to §1-210(b)(1), G.S., necessarily entails examination of the records with reference to both §1-210(b)(1), G.S., and §1-210(e)(1), G.S.

37. The respondents main contention with regard to §1-210(b)(1), G.S., is that the records that they have withheld are drafts that are subject to revision, and, as such, are not subject to disclosure. The respondents further contend that many of their draft records contain the methodology that they employ during their audit process, which if disclosed to the public at large would render their audit process less effective, if not ineffective.

38. Upon a careful review of the in camera records identified in paragraph 32, above, it is found that the following in camera records are preliminary drafts or notes: IC-2016-0677-F1-6; IC-2016-0677-F1-7; IC-2016-0677-F1-18 through IC-2016-0677-F1-21; and IC-2016-0677-F4-1 through IC-2016-0677-F4-163. It is found that these records are the respondents' draft versions of the both the draft audit reports and the final audit reports⁵, as well as the auditor's notes. It is found that the respondents have determined that the public interest in withholding these records clearly outweighs the public interest in disclosure. With regard to the auditor's notes, it is found that such records are not interagency or intra-agency memoranda, letters, advisory opinions, recommendations or reports, within the meaning of §1-210(e)(1), G.S. With regard to the preliminary draft documents, it is found that such records are incomplete, draft versions of the draft audit reports and the final audit reports. It is further found that these draft reports are intra-agency reports, within the meaning of §1-210(e)(1), G.S.; however, such documents were also subject to revision prior to submission to or discussion among the members of the respondent department, within the meaning of such provision. Accordingly it is found that the in camera records identified in this paragraph are exempt from disclosure, pursuant to §§1-210(b)(1) and (e)(1), G.S

39. It is found that the following records are not preliminary drafts or notes within the meaning of §1-210(b)(1), G.S.: IC-2016-0677-F1-1 through IC-2016-0677-F1-5; IC-2016-0677-F1-8 through IC-2016-0677-F1-17; IC-2016-0677-F1-22 through IC-2016-0677-F1-27; IC-2016-0677-F3-1; and IC-2016-0677-F5-1 through IC-2016-0677-F5-47, but rather are completed records, which contain final agency determinations, procedures and/or processes with regard to Medicaid audits in general as well as the two audits described in paragraph 24, above.

40. It is found that the records identified in paragraph 39 are not exempt from disclosure pursuant to §1-210(b)(1), G.S., and therefore it is concluded that the respondents violated the FOI Act when they refused to disclose these records to the complainants.

41. Next, the respondents contend that the following records are exempt from disclosure pursuant to §17b-90, G.S.; 42 U.S.C. §1396a(7); §1-210(a), G.S.; and §1-210(b)(2), G.S.: IC-2016-0677-F2-1 through IC-2016-077-F2-14, and IC-2016-0677-F6-1 through IC-2016-0677-F6-412.

42. Section 17b-90, G.S., provides, in relevant part:

(b) No person shall, except for purposes directly connected with the administration of programs of the Department of

⁵ For purposes of clarity, it is found that the respondents' final versions of the draft audit reports and the final audit reports have been disclosed to the complainants.

Social Services and in accordance with the regulations of the commissioner, solicit, disclose, receive or make use of, or authorize, knowingly permit, participate in or acquiesce in the use of, any list of the names of, or any information concerning, persons applying for or receiving assistance from the Department of Social Services or persons participating in a program administered by said department, directly or indirectly derived from the records, papers, files or communications of the state or its subdivisions or agencies, or acquired in the course of the performance of official duties. (Emphasis supplied).

43. It is found that the information contained in the records identified in paragraph 41, above, is “information concerning persons . . . receiving assistance from [DSS]” that was “acquired” by DSS “in the course of the performance of official duties.” In fact, it is found that such records describe in detail the specific medical treatment individuals receiving medical assistance through DSS have received and/or the specific medical conditions that individuals receiving medical assistance through DSS have experienced or continue to experience.

44. It is concluded that that the records referenced in paragraph 41, above, are exempt from mandatory disclosure pursuant to §17b-90, G.S., and that the respondents did not violate the FOI Act when they declined to disclose these records to the complainants.⁶

45. In sum, it is concluded that the respondents violated the disclosure requirements of §§1-210(a) and 1-212(a), G.S., when they declined to disclose to the complainants the records identified in paragraph 39, above.

The following order by the Commission is hereby recommended on the basis of the record concerning the above-captioned complaint:

1. The respondents shall forthwith provide the complainants with copies of the requested described in paragraph 39 of the findings, above, free of charge.



Valicia Dee Harmon
as Hearing Officer

2016-0677/HOR/vdh/07/06/2017

⁶ Because it is concluded that the in camera records identified in paragraph 41, above, are entirely exempt from public disclosure pursuant to the provisions of §17b-90, G.S., the Commission need not address the additional claims of exempt raised with respect to these records.